SUPREME COURT, U. S.

SEP 25

JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1967.

No. 28.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Admr. of the Estate of JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, Deceased,

Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, Admr. of the Estate of DONALD CIONCI, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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QUESTIONS PRESENTED.

1. When an automobile owned by the named insured in an automobile liability insurance policy is lent to an operator, who is killed in a car collision causing additional deaths and serious injury and the insurer refused coverage to operator's estate as defendant in multi-party suits, both in state and federal courts, in which the insured was not a party and the issues different, was not a declaratory judgment action against the insurer to determine coverage under the permissive use clause, in which all the victims were joined as plaintiffs, within the sound discretion of the trial judge?

2. Under the above circumstances, where the named insured is not a party to the declaratory judgment action but is a defendant in tort actions pending in a state court where he may have judgments entered against him, and may suffer prejudice as a result of the judgment in the declaratory judgment action, and where the insurer may also suffer prejudice in the form of double liability and multiplicity of suits, and where the plaintiffs have full and adequate remedies in a forum where all parties can be joined, is it error to dismiss the declaratory judgment action since consideration of all the factors indicates that the court could not, in equity and good conscience, proceed to judgment in the absence of the named insured?

ARGUMENT.

A federal court of appeals has the power and the duty to vacate a judgment of a district court, and to order the dismissal of an action, where it is found that the district court judgment is based upon principles of law which are contrary to the opinions of the Supreme Court or to rules promulgated by the Supreme Court for procedural guidance of lower courts. The Court of Appeals for the Third Circuit exercised its power and performed the duty imposed because the Court recognized that justice could not be done to *all* parties in the absence of Dutcher, the named insured in the automobile liability policy issued by Respondent. Since the judgment of the lower court was violative of fundamental rights of both Dutcher, the absent party, and Respondent; and since the judgment could not achieve the purpose which justifies entertaining an action for a declaratory judgment, the lower court abused its discretion in proceeding to judgment.

Since the object of all rules of law, whether substantive or procedural, is the attainment of justice, the process of reasoning toward the object must not be confused by the use of terms in the premises which are only proper in the conclusion. The Court of Appeals avoided substituting labels for reasoning effectively in the opinion filed in this case. The Respondent will attempt to follow the same course and to avoid any blind reliance upon conclusory terms. It is only after considering all of the facts as they relate to Dutcher, the absent person, and all of the parties, that it becomes clear that the absence of Dutcher made it impossible for the trial court to do justice to all the parties. When that conclusion is reached, the term "indispensable" may be used, not as a reason but as the result of reasoning.

Whether old Rule 19 or new Rule 19 or neither applies to the instant case, the result must be the same. The Rules of Civil Procedure for the United States District Courts cannot establish standards or criteria which would deprive any person of justice and should not be interpreted in such fashion as to bring about that result. Some writers[1] on the subject of parties expressed the view that some courts did not have a correct understanding of what is meant by jurisdiction and did not give all the reasons for their opinions that the writers felt were necessary. New Rule 19 is in the nature of an instruction to the judges of the federal district courts with respect to the concepts they should form: concepts of equity and good conscience; and some of the facts they should consider in forming these concepts which, when formed, will determine whether or not the action should be dismissed or retained. New Rule 19 does not purport to list all the criteria which may be considered by the court but merely states that those specified should be included [Rule 19(b)].

Considered in the light of the opinions of this Court from earliest times, and the opinions of inferior courts guided thereby, new Rule 19 does not create any new law nor construct new bases on which to found determinations of controversies. The need for equitable and conscience-guided evaluations always has been, and the various criteria are discussed and considered in various opinions.[2]

The facts of the instant case, the positions in which the parties would find themselves if the judgment of the lower court were permitted to stand, the positions in which they

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[1] Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957) and Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961).

[2] **Elmendorf v. Taylor,** 23 U. S. (10 Wheat.) 152, 166-67 (1825); **Mallow v. Hinde,** 25 U. S. (12 Wheat.) 193, 197 (1827); **Payne v. Hook,** 74 U. S. (7 Wall.) 425 (1868); **Roos v. Texas Co.,** 23 F. 2d 171 (2 Cir. 1927).

would be if the action of the Court of Appeals is affirmed, and the contentions of the Petitioner will be examined with reference to new Rule 19. In so doing the use of the term "pragmatic" must be avoided as a "label" more likely to cause confusion than the labels which the theorists condemned in their criticisms of the courts. If the factors enumerated in section (b) of Rule 19 are labeled "pragmatic" it is in the sense of "practical and efficient" not "pragmatic sanction."

Petitioner states in the preamble to its argument: "The record indicates that the interest of the named insured (Dutcher) was contingent and highly remote."[3]. However, during a conference with the Trial Judge, counsel for Petitioner argued with effect that Dutcher's interest was of major importance saying . . . "it is of immediate gain or loss to Dutcher on what happens in this case, . . ." and ". . . he (Dutcher) has a direct gain or loss in this cause of action, . . ." (R. 91). It was on the basis of this argument that the Trial Judge declared Dutcher incompetent and refused to permit him to testify in the action brought by Petitioner (R. 190).

Immediately following the statement with respect to the interest of Dutcher, Petitioner purports to interpret the allegations of negligence in the Complaints in Trespass filed in Delaware County by Harris and the Smith Estate[4] and writes that the causes of action are "grounded in agency." The statement is only partially correct. The Complaint of Harris in paragraph 14 (c) charges that Dutcher's automobile had defective brakes and in 14 (e) that he failed to comply with Acts of Assembly and local ordinances. The Complaint of the Smith Estate charges Dutcher with violation of Acts of Assembly and local ordinances. Under

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[3] Petitioner's Brief, p. 8, para. 3.

[4] Petitioner's Brief, pp. 32 and 35.

these pleadings evidence could be introduced to support a finding that Dutcher was liable without reference to agency. Obviously, no one can predict that there can be no proof of agency.

Petitioner states Respondent has not sought any disposition of the tort actions in Delaware County. Neither have the plaintiffs, nor has the Cionci Estate. It is apparent from the dealings between Petitioner and the Cionci Estate that had Petitioner any desire to have the tort actions tried, the Cionci Estate would have ordered them down. The impecunious Cionci Estate settled with Petitioner for $50,000,[5] the exact amount of Respondent's coverage available for the bodily injury or death of one person. This was certainly cooperation. And the amount of the settlement might be considered in evaluating the statement of the Petitioner[6] to the effect that Respondent's policy limits were first disclosed in its brief and that Petitioner "effectively shielded the policy limits from discovery."[7]

Toward the end of preamble to its argument, Petitioner says:[8]

> "The owner of the vehicle, the named insured, not being a party to this action, his interest in the finite limits of the policy cannot be affected and he would stand to benefit by an active participation of the insurer in a defense on the merits as to the estate of the operator."

That part of the first sentence which relates to the interest of the named insured (Dutcher) is in striking contrast to the theory on which the Petitioner tried its case (R. 91), as

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[5] Petitioner's Brief, p. 4.

[6] Brief for Petitioner, p. 15.

[7] Brief for Petitioner, p. 19.

[8] Brief for Petitioner, p. 8.

hereinbefore discussed at page 4, and as a result of which the key ruling of Dutcher's incompetence was made. The position now taken by Petitioner is that taken by Respondent in the Court of Appeals. There it was pointed out that Dutcher could not be bound by the judgment of the District Court. Under the doctrine of *Maryland Casualty Co. v: Pacific Coal and Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941), the federal court should not entertain a declaratory judgment action if its judgment will not bind a person who is free to go into a state court where the judgment may be exactly opposite the finding in the federal court.

The second part of the first sentence quoted above is at variance with Petitioner's contention that Dutcher does not stand in any peril with respect to the tort actions against him. If the latter contention were correct, Dutcher would have no interest in Respondent's participating in the defense of the Cionci Estate. However, he is in peril and that is one of the reasons the action of the Court of Appeals should be affirmed. This reason will be discussed hereinafter in conjunction with other reasons for affirmance.

No Judgment Consistent With Justice To All Parties And The Absent Person Can Be Rendered Unless No One Of Them Will Suffer Substantial Harm By The Operation Of Such Judgment.

The foregoing proposition may be labeled a truism or attacked as a platitude. The same may be done with respect to the assertion that one plus one equals two, but that assertion is not being denied nor is imaginative thinking, or the so-called "pragmatic" approach resulting in its being replaced in selected mathematical equations to achieve a predetermined answer.

The plain fact is that no judgment could be rendered in this case which would not seriously affect Dutcher and Respondent. That is the reason the Court of Appeals ordered the District Court to dismiss. There was no blind reliance on the term "indispensable" because the Court did not arrive at a conclusion as to indispensability until consideration had been given to the interests of Dutcher. The magnitude of Dutcher's interest was successfully urged upon the Trial Judge by Petitioner and the latter was obviously impressed and followed the path chosen by Petitioner. So doing led to an erroneous ruling on evidence and the unfortunate decision to tell the jury that it had to find in favor of the Lynch and Smith Estates but could find a different verdict in the Harris case although it was impossible for the operative facts to be any different in the death cases than in the injury case. However, Dutcher's right that this case should not be tried involves a great deal more than is spelled out in the opinion of the Court because a court does not have to go into minute detail for every proposition it states. The dissenting opinion does not evidence a realization of, or, at least does not mention or give any effect to, the problems the judgment creates for Dutcher. It takes some notice of the problems created for Respondent by this piece-meal handling of the coverage problem and seeks to foreclose consideration of any problem not recognized or discussed by writing: "Any other practical contingencies which imagination may suggest are of no legal consequence" (R. 255).

The first factor which Rule 19 (b) recommends to the consideration of a court is existence of prejudice, by reason of non-joinder, to the absent person or those already parties.

(a) The absent person, Dutcher, will be prejudiced if the judgment of the District Court is affirmed.

Dutcher is entitled to the full protection of his policy if, as he has testified, Cionci violated the permission given to him and Lynch to use the Dutcher vehicle for a limited purpose. However, a judgment which does not bind him says his insurance carrier must pay, at least to the limit of the policy, any sums adjudged due the estates of the deceased persons, and the bodily injury claimant. Suits on behalf of one deceased and the injured party are pending in the state court in Delaware County, Pennsylvania. The Cionci Estate has consented to a judgment against it in the amount of $50,000 in the federal district court in Philadelphia.

Statements in the dissenting opinion which speculate concerning the possibility that Dutcher will not find himself in conflict with the Cionci Estate for the benefit of the limited coverage of Respondent's policy are unrealistic (R. 253). There is open a death case and a severe bodily injury claim. Neither the District Court nor the Court of Appeals had information upon which to base any judgment as to the settlement value or verdict exposure in those cases. If any conclusion is to be reached, in light of the fact that one death case was settled for $50,000, it would be that there will be a conflict between Dutcher and the Cionci Estate. Accepting the possibility of a conflict, it is suggested by the dissenting judge (R. 254) that Dutcher make claim of "superiority" over Cionci's Estate to indemnity under the policy. There is no suggestion as to what the term "superiority" means. If Dutcher prevails over the Cionci Estate, the latter has no right to the fund as far as Dutcher is concerned. There will be no superior and inferior rights. But there will be a judgment in one court contrary to another

judgment in the same court or another court, depending upon whether Dutcher sues in the federal district court or a state court, and that is exactly the situation that this Court said should be avoided in the case of *Maryland Casualty Co. v. Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941). It was there held that a federal court should not entertain a case where its decree cannot bind a party who is free to go into a state court where he may obtain a judgment directly opposite that obtained in the federal court. In the instant case, Dutcher could sue the Respondent and the Cionci Estate in the federal court in Philadelphia and obtain a judgment which would deny coverage to the Cionci Estate and require that the Lumbermens preserve its entire coverage for his protection. In short, Dutcher can obtain both state and federal court judgments contrary to the judgment of the District Court in this case.

All of this expense and inconvenience would be foisted upon Dutcher because of a judgment in a case where he was not a party.

While there are cases where relief has been shaped and imaginative decrees entered, no reference is made in the dissenting opinion or in the brief for Petitioner to any such decree where the contraindications were as in this case. No decree can be entered commanding Dutcher not to institute suits for his protection because the Court has no jurisdiction over Dutcher and no power to forbid him to bring such suits. The idea that Dutcher would bring suits is not speculative as are the various hypotheses in the dissenting opinion and the brief of Petitioner. Indeed, it is not speculative. One would be justified in stating with a great deal of assurance that suits will be brought. What will the decree provide in respect of judgments, one of which holds, in effect, that the Cionci Estate may have full use of the fund Dutcher has created for his protection and another which

says the Cionci Estate shall have no right to any part of the fund.

All that is said with respect to the proposed decree is that Respondent will not be required to make any payment under the policy until the tort actions have gone to final judgment and Dutcher's claims to coverage have been settled (R. 254). Very conservatively this means a delay of three to four years. At the end of that time there will be, in all likelihood, irreconcilable judgments.

Since the dissenting opinion has mentioned that more than eight years had passed since the date of accident (R. 256), which occurred January 17, 1958, it must be noted that neither Dutcher nor Respondent had anything to do with timing. Petitioner apparently did not want to bring its tort action in Delaware County where the accident happened and where Lynch, Cionci, Smith, Harris and Dutcher lived at the time of the accident and where the survivors lived thereafter. Cionci's widow and parents failed to apply for Letters of Administration and an out-of-state person, unrelated to decedent, was chosen and appointed. Diversity was thus created and suit brought in Federal Court. This all took time. After suit was instituted, by agreement for the attorneys for Petitioner and the Cionci Estate, the case was removed from the non-jury trial list. The declaratory judgment action was instituted June 5, 1959 (R. 2) but was not ordered on the trial list until September 25, 1959 (R. 3). It was tried in December, 1962 (R. 8). Had the Respondent, or any plaintiff, thought time to be of any importance, all actions would have been brought in Delaware County and every aspect of liability and coverage determined within two years.

Should judgments against Dutcher in the tort actions of the Smith Estate and Harris be less than the coverage provided by Respondent, the latter could take an appeal, if indicated, on behalf of Dutcher and file a supersedeas bond.

But, if the sum of those judgments and the judgment of $50,000 in favor of the Lynch Estate against the Cionci Estate is in excess of Respondent's coverage, the Respondent could render itself liable for more than its coverage. Dutcher would be justified in taking the position that, since he is not bound by the judgment in the instant case, Respondent must furnish the bond. The latter saying it is bound by the judgment in the instant case would contest the obligation to furnish bond. If the decree provides that the plaintiffs may not execute on their judgments but must await the outcome of the appeal, even though no supersedeas bond has been filed, such decree would constitute an interference with the state court's control of its own judgments in a situation where the federal court jurisdiction is based solely upon diversity. If the decree does not so provide, Dutcher's appeal cannot be processed effectively because the Smith Estate and Harris can collect the judgments before the appeal could be heard. There is nothing in the dissenting opinion to indicate what the decree would provide in the situation set forth. Dutcher may decide to take no action with respect to the coverage of the policy until judgments have been entered in the tort actions in the state courts. Before the coverage question is decided execution might be had on the state court judgments and there would be a judgment against Dutcher, unsatisfied by the amount that the sum of all judgments exceeded coverage even though he is not bound by the judgment in the instant case. The only alternative would be for the Respondent to commit itself to an obligation in excess of its coverage. The dissenting opinion contains a reference (R. 253, fn. 7) to a clause in the policy which provides that the "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." The problem would be to interpret the clause if one court says the Cionci Estate is an insured and the other court says it is not. Dutcher, successful in a

coverage action, would say he is the only insured. Respondent, if the judgment of the District Court is affirmed, would say that there are two insureds. The problem will be quite complex if Dutcher obtains judgment against Respondent in the same court where the Lynch Estate got a judgment against Respondent on exactly the same facts established by the same testimony. In that event, the District Court in another suit will have to decide whether Dutcher is the only insured, as his judgment will hold, or must share his coverage with another insured in accordance with the judgment of the Court in the instant case. It is this type of confusion that demonstrates the futility of employing what amounts to pragmatic sanction, under the guise of pragmatic approach, and indicates the utility of law founded upon concepts of justice which have been enunciated by this Court and used as a basis for new Rule 19.

In *Payne v. Hook,* 74 U. S. (7 Wall. 425 (1868)), cited in the minority opinion (R. 252, fn. 5), there is no indication of any dispute between the distributees of the fund from which the plaintiff asked only for his share. In the instant case it is obvious that Dutcher must have the entire fund for his protection. This Court in that case said the absent parties could come in and share the benefits of the litigation at a later date. The absent party in the instant case, Dutcher, cannot come in and share any benefits of the instant litigation because, so far as he is concerned, there are no benefits to share. The opinion in Payne drew attention to the prevention of a multiplicity of suits by permitting the case to proceed. Upon analysis of the various aspects of the case now before the Court, it is clear that extensive litigation and numerous suits must result from the procedure suggested in the minority opinion.

(b) The Respondent will be prejudiced if the judgment of the District Court is affirmed.

In his article entitled "Compulsory Joinder of Parties in Civil Actions", 55 Michigan Law Review 327, 334, Reed expresses the thought that a court should not concern itself with the controversy between the parties in court if the absent person is so intimately related to the controversy that further litigation will be required to establish his position. And later (p. 356) advocates ". . . an informal, rational balancing of competing interests case by case—interests relating to the helplessness of plaintiff, double vexation of defendant, the possible effect on absent parties, the convenience of the Court, and the equity and good conscience—in short, the justice, of the end result."

In *Shields v. Barrow,* 58 U. S. (17 How.) 130, 139 (1854), this Court said:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Fink in his article entitled "Indispensable Parties and the Proposed Amendment to Federal Rule 19" 74 Yale Law Journal 403, 405 discussing the above quotation says:

> "The second [reason] looks to the protection of the parties presently before the Court, and society in general, from repetitious, abortive, and vexatious litigation. Thus a person may be deemed to be an indispensable party if, without his presence, the defendant in the present litigation will be subjected to double vexation with the possibility of inconsistent results. The absent

person must be joined so that he will be bound by the outcome of the present action [Davenport v. Dows, 85 U. S. (18 Wall.) 626, 627 (1874)]."

The theme of the Respondent's discussion of the problem before the Court is, in the words of Professor Reed, ". . . the justice of the end result." Rule 19 specifically provides for the dismissal of an action when, after analyzing all the ramifications of the total situation, it is found that the absent person is indispensable. It would seem to be a contradiction in terms to say that, even though the absent person is indispensable, anyone who would be injured by his absence, does not have a substantive right to dismissal. If, in equity and good conscience, the case may not proceed to judgment, doing so would constitute violation of the right of due process of law.

Examining the instant case with reference to the case law, Rule 19, and the studies made by Reed and Fink, it is seen that the judgment of the District Court would subject Respondent to double vexation, double liability, prejudicial interference with the defense of its insured and inconsistent judgments. These are not contingencies suggested by imagination with no legal consequences. Because the rights of Dutcher, the absent person, and Respondent are so intimately related and intertwined, much that has been said regarding prejudice to Dutcher indicates prejudice to Respondent. If Dutcher does not bring actions against Respondent to protect himself, Respondent must do so in an effort to avoid double liability. Respondent cannot await the outcome of the trespass actions in the state court because decisions will have to be made immediately with respect to motions or appeals on behalf of Dutcher, and the Respondent must have a judgment determining Dutcher's rights in relation to the rights of the Cionci Estate in order to make such decisions. Consideration of the practical problems involved

refute the intimation in the dissenting opinion that this is a very simple matter and that the all-important object is to preserve the verdict of a jury.

The minority opinion goes far beyond Rule 19 and the reasoning of Reed and Hazard, whose commentaries are thought to have had some influence on the formulation of the rule, by failing to consider some of the recommended tests.

As indicated in the above quotation from Reed's article, interests relating to the helplessness of the plaintiff are to be considered. In this case the Petitioner is not helpless. It has a forum where all parties could be joined and it always has had such forum. This is not a case where the plaintiff must obtain relief in the forum he chooses or have no relief.

It is submitted that equity and good conscience, the concept being formed after consideration of the various factors outlined in Rule 19, forbids the action suggested by the minority and calls for an affirmance of the order of the Court of Appeals. Prejudice to the absent party and to Respondent have been discussed. No adequate decree can be fashioned and the Petitioner unquestionably has an adequate remedy if the action is dismissed. The Petitioner had a remedy before it tried the declaratory judgment action. It had a judgment against the Cionci Estate and could have proceeded directly against the insurance carrier by garnishment. If Petitioner sought some advantage by electing to pursue a different course, it is only just that it should bear the burden when it develops, as it has, that an adequate judgment cannot be rendered.

The Declaratory Judgment Action Brought by the Estate of a Deceased Passenger to Determine Whether the Insolvent Estate of the Deceased Operator Is Insured Within the Terms of an Automobile Liability Policy, Absent Objections from Other Claimants or the Insurer Is Not Within the Sound Discretion of the Trial Court.

The opinion of the Court of Appeals states:

> "[T]he District Court erred in that in the appropriate exercise of its discretion it should have denied relief without consideration of the merits in view of the fact that two pending actions in a state court, earlier referred to, in which the here absent Dutcher, as well as the Cionci, Lynch and Smith estates, and Harris, were parties, presented the critical mooted question as to the coverage of Lumbermens' policy at issue in the instant declaratory judgment action" (R. 225).

The Petitioner contends in its brief (p. 21) that the Court of Appeals premised its holding with respect to the propriety of the District Court's hearing the declaratory judgment action on a mistaken assumption. It must be assumed that the reference is to that part of the opinion set forth above. It would seem that Petitioner misunderstands what the Court said. There can be no doubt that the Court understands that the tort actions and the coverage questions cannot be tried simultaneously. The quoted section of the opinion can only mean that the outcome of the tort actions might render the coverage question moot. Furthermore, if the coverage question had to be decided, all of the parties that could conceivably be affected would be parties in the trial of the coverage question because subsequent to the disposition of the tort action attachment executions could be

issued, service of interrogatories made upon the insurer, and the coverage question tried. It certainly makes no difference that the personal representative of the Lynch Estate in Delaware County is not the same as the personal representative of the Lynch Estate in the declaratory judgment action. So far as coverage is concerned, the identity of the personal representative is of no significance. Obviously the issue of coverage cannot be resolved on the basis of findings with respect to agency and there is no suggestion in the opinion of the Court that that could be done. Petitioner errs in stating that another suit would be required to determine coverage in Delaware County. Coverage can be simply determined by the garnishment action.

Accepting the statement of the principal criteria for rendering declaratory judgments as being (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding (brief, p. 22) it is immediately apparent that the judgment in the instant case accomplishes neither of these purposes. All that has been heretofore said regarding matters not settled and questions that must be resolved by further litigation is pertinent.

The impropriety of proceeding with the declaratory judgment action is covered by the opinion of the Court and there would seem to be no point in attempting to re-work what has been set forth. It would seem to suffice to point out that maintaining jurisdiction of the declaratory judgment action is contrary to the holding of this Court in *Maryland Casualty Co. v. Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Court Rep. 510 (1941).

In that case an injured man was joined in a declaratory judgment action brought by an insurance carrier against its named insured. The Court of Appeals affirmed the action of the District Court which had sustained a demurrer by the

injured man. This Court reversed and held that he must remain a party to the action. The reason given was that the federal court might determine the question in one way, its declaration not being binding on the injured man, and the state court might enter a contrary judgment.

CONCLUSION.

The absent person is an indispensable party whether the conclusion with respect to indispensability is based upon case law, as enunciated by this Court prior to Rule 19, or application of Rule 19, the same standards being applicable under either and Rule 19 specifically recognizing the concept of indispensability where, as in the instant case, an effective judgment cannot be rendered.

This is not a proper case for a declaratory judgment action because it cannot settle the legal rights of all persons concerned, would result in trying the controversy piecemeal and makes possible irreconcilable judgments on the issue.

Respectfully submitted,

NORMAN PAUL HARVEY,
Attorney for Respondent.